2011 IL App (5th) 100226-U

NO. 5-10-0226

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

MEYER LOGISTICS, LLC,	) Appeal from the
	) Circuit Court of
Plaintiff-Appellee,	) St. Clair County.
	)
v.	) No. 05-MR-137
	)
THE BANK OF EDWARDSVILLE,	) Honorable
	) Andrew J. Gleeson,
Defendant-Appellant.	) Judge, presiding.

JUSTICE STEWART delivered the judgment of the court.
Justices Spomer and Wexstten concurred in the judgment.

ORDER

¶ 1 *Held*: The plaintiff agreed to assign 3% of its factored accounts receivable to two trucking companies who, in turn, agreed to assign the 3% factor payment to the defendant bank for payment on their debts that were secured by the bank's lien on their trucks and equipment. The evidence presented at the bench trial supported the circuit court's finding that the plaintiff agreed to make the 3% factor payment in exchange for a lease of the trucks and equipment and the bank's agreement not to repossess the trucks and equipment. The circuit court properly entered a judgment against the bank and in favor of the plaintiff for the amount of the 3% factor payments that the bank received after it repossessed the trucks and equipment. The plaintiff was not barred from recovering money from the bank under the voluntary payment doctrine or under a theory of piercing the plaintiff's corporate veil.

¶ 2 The plaintiff, Meyer Logistics, LLC (Meyer Logistics), filed a complaint for a declaratory judgment against the defendant, The Bank of Edwardsville (the Bank), alleging that the Bank was improperly collecting 3% of Meyer Logistics' accounts receivables that Meyer Logistics had factored with a third entity, Interstate Capitol Corporation (ICC). After a bench trial, the circuit court granted a judgment in favor of Meyer Logistics in the amount of $591,000 and ordered the Bank to discontinue collecting 3% of Meyer Logistics' receivables factored with ICC. The Bank appeals and advances three alternative theories for reversing the circuit court's judgment: (1) the rules of contract construction, (2) the voluntary payment doctrine, and (3) piercing the corporate veil. We affirm the circuit court's judgment.

¶ 3 BACKGROUND

¶ 4 The dispute between Meyer Logistics and the Bank stems from financial agreements that the Bank initially made with two other companies, Meyer Transportation, Inc. (Meyer Transportation), and Meyer Container and Trailer Service, Inc. (Meyer Container). Meyer Transportation was a corporation that was formed in 1992 and was initially owned by three brothers, Dennis Meyer, David Meyer, and Douglas Meyer (collectively referred to as "the Meyer brothers"). Meyer Container either was owned by David Meyer and Douglas Meyer or was a wholly owned subsidiary of Meyer Transportation. Meyer Transportation, Meyer Container, and the Meyer brothers are not parties to this lawsuit. However, because Meyer Transportation's and Meyer Container's financial obligations with the Bank precipitated the events leading up to Meyer Logistics' lawsuit against the Bank, we must first introduce Meyer Transportation and Meyer Container and describe their dealings with the Bank leading up to Meyer Logistics' incorporation and its subsequent claim against the Bank.

¶ 5 Meyer Transportation was engaged in the business of "intermodal trucking." Cargo containers are shipped to the United States from overseas and then transported to St. Louis, Missouri, by railroad. Meyer Transportation's intermodal trucking business involved transporting the cargo containers from St. Louis to various customers throughout the region. Meyer Container stored and repaired the cargo containers for Meyer Transportation.

¶ 6 The events leading up to the dispute at issue originated, in part, with a financial agreement between the Bank and Meyer Transportation. On July 25, 2002, the Bank and Meyer Transportation entered into a financial transaction in which the Bank agreed to purchase a certain amount of Meyer Transportation's accounts receivable at a discount, *i.e.*, below their face value, in exchange for the Bank furnishing Meyer Transportation with immediate funds to finance Meyer Transportation's cash flow. This arrangement is commonly known as "factoring." In a factoring agreement, the factor earns a profit by buying the accounts receivable at a discount from their face value, and the other party benefits from immediate cash to finance continued business operations. In the present case, the parties titled their factoring agreement as "The Business Manager Agreement." The Business Manager Agreement provided that, in the event that Meyer Transportation received money for an accounts receivable that it had sold to the Bank, it was required to hold the payment in trust for the Bank and remit the payment to the Bank no later than the next banking day.

¶ 7 At the time the parties entered into the Business Manager Agreement, Meyer Transportation and Meyer Container were also indebted to the Bank on installment loans for the purchase of trucks and equipment. To secure the Bank's notes for these loans, the Business Manager Agreement granted the Bank a security interest in all of Meyer Transportation's present and future accounts receivable.

¶ 8 In February or March 2003, the Bank was concerned that Meyer Transportation had breached its obligations under the Business Manager Agreement. Specifically, the Bank was concerned that Meyer Transportation had collected $700,000 from certain accounts receivable that it had sold to the Bank under the terms of the Business Manager Agreement, but had not remitted the money to the Bank. In addition, Meyer Transportation had become past due on its installment truck and equipment loans.

¶ 9 On April 4, 2003, the Bank sent a letter to Meyer Transportation and the Meyer brothers notifying them that they were in default on their loans with the Bank and on their obligation under the Business Manager Agreement. The Bank demanded full payment on the entire balance due on all of the notes and the amount it was owed under the Business Manager Agreement. The Bank, Meyer Transportation, Meyer Container, and the Meyer brothers then began to negotiate a modification or restructuring of the various financial agreements and obligations between the parties.

¶ 10 On April 14, 2003, an attorney representing Meyer Transportation sent the Bank a letter with a proposal. In the letter, the attorney suggested that the father of the Meyer brothers, Gilbert Meyer, would form a new corporation, Meyer Logistics, solely owned by him. Gilbert Meyer was not a shareholder or officer of Meyer Transportation or Meyer Container. The attorney proposed that the Bank would foreclose on its lien on Meyer Transportation's 14 trucks and resell the trucks to Meyer Logistics at an agreed amount and on a 48-month, 7% note. Meyer Logistics would pay the Bank $5,000, to be applied toward Meyer Transportation's outstanding debts, and would pay $10,000 per month for six months toward the debts. The letter further stated as follows:

> "At the end of the six month period the parties would review as to whether this transaction was satisfactory. Presumably if Logistics could pay more quickly it would do so. So long as agreed upon payments were made, Bank would forebear on its right to sue on the guarantees but not forgive said right."

¶ 11 The parties did not enter into this agreement, but continued negotiating.

¶ 12 On May 7, 2003, the Bank entered into a "Pre-Workout Agreement" with Meyer Transportation and Meyer Container to confirm the status of the various loans and agreements. In the Pre-Workout Agreement, Meyer Transportation and Meyer Container acknowledged that they had breached the Business Manager Agreement by collecting accounts receivable that the Bank had purchased and failing to forward the money to the Bank. They acknowledged that they were unable to immediately pay the Bank the full amount that was due to the Bank under the Business Manager Agreement. They also acknowledged that the Bank was entitled to immediately exercise its right to foreclosure on its security interests in Meyer Transportation's "accounts, inventory, equipment, furniture, fixtures and general intangibles."

¶ 13 The Pre-Workout Agreement states that the parties to the agreement "plan to continue to discuss various courses of action that might be in the parties['] mutual interest and to negotiate in good faith to attempt to reach an agreement on a modification of the [loans]." The Bank's vice-president of special assets, David Gehlbach, described the Pre-Workout Agreement as follows: "Upon recognition of the default, the agreement just set the stage, so to speak, that we would be willing to discuss and negotiate going forward and how we could resolve this in a reasonable way with the borrower." The document stated that it was "a material inducement for the Bank to participate [in negotiations]." Gehlbach testified that he believed that, at that time, the Bank had a blanket security interest in all of Meyer Transportation's and Meyer Container's assets.

¶ 14 After entering into the Pre-Workout Agreement, negotiations between the Bank, Meyer Transportation, and Meyer Container continued.

¶ 15 On April 4, 2003, Gilbert Meyer incorporated Meyer Logistics as a Missouri limited liability company. At some point, Meyer Logistics entered into the business of intermodal trucking and began using Meyer Transportation's trucks, equipment, and building space. To address its immediate cash flow needs, Meyer Logistics entered into a factoring agreement with ICC on May 14, 2003. In order to factor Meyer Logistics' accounts receivable, however, ICC required an intercreditor agreement with the Bank to ensure that the Bank did not claim priority in Meyer Logistics' receivables factored with ICC. Therefore, on May 19, 2003, Meyer Logistics' attorney sent an email to Gehlbach and to Meyer Transportation's attorney requesting an intercreditor agreement with the Bank "that states that the Bank does not have a security interest in all invoices sent by Meyer Logistics, LCC." Gehlbach testified that he believed that the Bank had a security interest in Meyer Logistics' accounts receivable "to the extent that they were successors to Meyer Transportation."

¶ 16 On May 22, 2003, the Bank entered into an interim agreement with Meyer Transportation, Meyer Container, Meyer Logistics, David Meyer, Douglas Meyer, and ICC. The May 22, 2003, agreement states that the parties to the agreement were in the process of negotiating an "Intercreditor and Standstill Agreement." The May 22, 2003, agreement further stated that, until an Intercreditor and Standstill Agreement was finalized, the Bank was willing to allow an interim factor of specified accounts receivable of Meyer Logistics by ICC and that ICC would have a first security interest in the listed accounts receivable.

¶ 17 The May 22, 2003, agreement further provides as follows:

> "[Meyer] Logistics hereby assigns to [Meyer Transportation and Meyer Container] and [Meyer Transportation and Meyer Container] hereby assigns to Bank three percent, (3%) of all monies advanced to [Meyer] Logistics under [Meyer Logistics' factor agreement with ICC] *** to be applied to the Bank indebtedness."

This 3% factor payment is at the center of Meyer Logistics' lawsuit against the Bank.

¶ 18 When Meyer Logistics entered into the May 22, 2003, agreement, it was not indebted to the Bank. All of the defaulted notes were between the Bank, Meyer Transportation, Meyer Container, and the Meyer brothers as guarantors. During Gehlbach's testimony, he was asked, "At no time Meyer Logistics was ever indebted to the bank, were they?" He answered, "not that I know of." In explaining the purpose of the May 22, 2003, agreement, Gehlbach testified that the agreement was intended to expedite Meyer Logistic's cash flow to allow it to operate until they could finalize a standstill agreement. When asked what Meyer Logistics received in return for assigning 3% of its factored accounts receivable, Gehlbach stated, "they were *** revenue generating and earning the profit from renting the trucks." He testified: "The purpose of this agreement was to set up the three percent to repay the debt. Using the equipment of Transportation and Container was–allowed them to do that, to continue to run, to deliver containers and earn–generate the revenue and utilize ICC as the factor." He explained that Meyer Logistics "received the customer base, the facilities and the equipment to begin their business." With respect to the language of the agreement, he testified as follows:

> "Q. [D]oes it say in there that [Meyer] Logistics gets to use the trucks, the equipment of anything belonging to Container and Trailer?
>
> A. It may not say that right here, but that's what was going on. That was exactly what was going on."

¶ 19 Later he testified that "[t]he three percent was to repay the indebtedness as a successor corporation." He knew, however, that Meyer Logistics was not owned by any of the Meyer brothers but was owned by their father, Gilbert Meyer, who had no interest in Meyer Transportation or Meyer Container. He testified that the 3% was never equated with the value of Meyer Logistics' lease of Meyer Transportation's trucks and equipment, and he did not recall any conversation that suggested that Meyer Logistics would pay the 3% only as long as it had use of Meyer Transportation's equipment. However, he contradicted this testimony during cross-examination. During cross-examination, when asked what Meyer Logistics received in return for the 3% factor payment, Gehlbach testified as follows: "They received the operation and the ability to begin their business and get started and to begin the–utilizing the equipment, the facilities, the customer base of Meyer Transportation and continue to generate revenue."

¶ 20 David Meyer testified that the purpose of the May 22, 2003, agreement was "to allow [Meyer Logistics] to use the equipment that was previously owned by Meyer Transportation and Meyer Container and to continue the business that was being moved forward." He testified as follows: "Meyer Transportation and Meyer Container was going to lease the equipment, and the money[, the 3%,] that we received from them [was] going to pay the debt to Bank of Edwardsville to pay down that debt."

¶ 21 In June 2003, Meyer Logistics continued to factor additional accounts receivable with ICC. Meyer Logistics, Meyer Transportation, Meyer Container, the Bank, and ICC entered into 10 addendum agreements that added these additional accounts receivable to the May 22, 2003, agreement. The addendum agreements refer to the May 22, 2003, agreement as an "Interim Agreement." Gehlbach testified that, at the end of June 2003, they decided that the addendums were taking "a severe amount of time" and that once ICC signed an intercreditor agreement with the Bank, they could begin to factor Meyer Logistics' invoices directly without an addendum.

¶ 22 On June 27, 2003, an attorney representing Meyer Logistics sent emails to ICC and Gehlbach authorizing ICC to withhold and pay the Bank 3% of the total dollar amount of invoices ICC purchased from Meyer Logistics. On that same day, ICC sent an email to Gehlbach confirming that it would withhold the 3% factor payment and would forward it to the Bank.

¶ 23 The Bank and ICC subsequently entered into a separate intercreditor agreement dated July 2, 2003. The recitations in the intercreditor agreement stated, "[Meyer] Logistics has leased some Bank Collateral from [Meyer Transportation and Meyer Container] to operate its business operations and provide revenue for [Meyer] Logistics ***." The intercreditor agreement then referenced Meyer Logistics' 3% assignment of its factored receivables to Meyer Transportation and Meyer Container and, in turn, their assignment of the funds to the Bank. In the intercreditor agreement, ICC agreed to remit 3% of Meyer Logistics' factored accounts receivable, and the Bank agreed that ICC would have the first security interest in the factored accounts receivable.

¶ 24 ICC completed the transfer of the 3% factor payments by placing the money into a reserve account that was held in the name of Meyer Transportation. Gehlbach testified that the Bank had "proprietary use" of this account. David Meyer also testified that "[t]he money went into a checking account at Meyer Transportation and then the bank would remove that money from the Meyer Transportation checking account."

¶ 25 On October 22, 2003, Gehlbach sent a letter on behalf of the Bank to Meyer Transportation and Meyer Container that outlined a temporary forbearance agreement between the Bank and Meyer Transportation and Meyer Container. The letter was accepted and agreed to by David Meyer on behalf of Meyer Transportation and by Douglas Meyer on behalf of Meyer Container. Gehlbach's letter began by outlining the outstanding notes and obligations that were in default. Gehlbach's letter continues as follows: "You have indicated that [Meyer Transportation and Meyer Container] have leased the company equipment and are providing certain services to Meyer Logistics ***. Meyer Logistics requires additional time to increase sales revenue and stabilize cash flow." The letter then states that Meyer Transportation and Meyer Container had requested the Bank to "temporarily refrain from commencing litigation to seek collection of the Obligations in order to allow [them] time to attempt to consummate the above described circumstances and repay the Obligations in the fall."

¶ 26 In Gehlbach's October 22, 3003, letter, the Bank agreed that it would forebear litigation on the defaulted obligations until December 31, 2003. Meyer Transportation and Meyer Container agreed to the amounts outstanding on each obligation, reaffirmed their liability, and acknowledged that they were in default.

¶ 27 With respect to their obligation to the Bank under the Business Manager Agreement, Meyer Transportation and Meyer Container agreed to pay an amount equal to the greater of: (1) $6,000 per month (not less than $12,000 over two consecutive months), (2) 3% of their total monthly revenue, or (3) "3% of the gross invoice amount of all invoices purchased by

Meyer Logistics' factor." As noted above, Meyer Logistics' factor was ICC, and ICC was forwarding 3% of Meyer Logistics' factored accounts receivable to the Bank pursuant to the May 22, 2003, agreement, addendums, and the June 27, 2003, email authorization.

¶ 28 Meyer Transportation and Meyer Container also agreed to provide the Bank with certain financial documents, including: "a merchant activity report detailing invoices purchased and an aging report on Meyer Logistics, by invoice, from the factor supporting all purchased invoice activity for the prior month" and a monthly Meyer Logistics accounts receivable aging schedule. Meyer Transportation and Meyer Container agreed to make an additional one-time payment of $8,000 and a monthly payment of $4,070 on the remaining defaulted loans separate and apart from the payment on their obligation under the Business Manager Agreement.

¶ 29 The letter agreement provided that the forbearance period would terminate on December 31, 2003, or earlier if Meyer Transportation or Meyer Container filed for bankruptcy, if they defaulted on their requirements under the agreement, or if "a default is declared under a certain Intercreditor Agreement dated May 28, 2003 by and between [ICC] and the Bank." Upon termination, the Bank had the "immediate right to seek collection of the Obligations by all available means unless the Obligations shall have been paid in full."

¶ 30 The letter agreement also states that it "fully supersedes all prior and contemporaneous understanding or agreements, both written and oral, between the Bank and [Meyer Transportation and Meyer Container]." Meyer Logistics was not a party to this forbearance agreement. The minimum payment for the outstanding obligation under the Business Manager Agreement, defined, in part, in terms of Meyer Logistics' 3% factor payment, was described as Meyer Transportation's and Meyer Container's obligation to the Bank, not as an obligation that Meyer Logistics owed to the Bank.

¶ 31 With respect to the purpose of this letter agreement, Gehlbach testified as follows:

> "The purpose of the forbearance agreement was to, as it says, forebear, you know, foreclosing on the company until the standstill agreement could be negotiated and that structure could be put together. It details all the loans and included loans beyond the Business Manager factor agreement and deals with the specific points that Dave and Doug Meyer agreed to in meetings we had and just puts that–sets out maturity to, I believe, another 90-day period until they were able to perform on the items that they'd agreed to in various meetings."

¶ 32 At the time of the October 22, 2003, letter agreement, Meyer Transportation and Meyer Container had gone out of business and had ceased operations. David Meyer testified that it was his understanding that the October 22, 2003, letter agreement made the May 22, 2003, agreement null and void.

¶ 33 On April 14, 2004, the Bank, Meyer Transportation, and Meyer Container entered into a second temporary forbearance agreement that extended the Bank's forbearance to July 31, 2004. This letter agreement contained substantially the same terms as the October 22, 2003, letter agreement except the balances on the outstanding obligations had changed and the forbearance term was extended to July 31, 2004. Gehlbach testified that they were still working on a final agreement at this time. Again, Meyer Logistics was not a party to this second forbearance agreement. David Meyer testified that, during negotiations, the Bank attempted to get Gilbert Meyer and Meyer Logistics to sign as a guarantor for Meyer Transportation's and Meyer Container's debt with the Bank, but Gilbert Meyer would not agree.

¶ 34 On July 27, 2004, the Bank filed a complaint against Meyer Transportation, Meyer Container, Meyer Logistics, and the Meyer brothers. Count VII of the complaint was a replevin action against Meyer Transportation, Meyer Container, and Meyer Logistics, requesting an order for the seizure of the assets of Meyer Transportation, including vehicles, equipment, receivables, and inventory. Count VII was the only count that named Meyer Logistics as a defendant. In paragraph 14 of count VII, the Bank alleged as follows with respect to Meyer Logistics:

> "Plaintiff believes that defendant Meyer Logistics, LLC, has leased and therefore has possession of a portion of the collateral, which leases would be subject to plaintiff's prior security interest. Certain vehicles owned by Meyer Transportation bear logos of Meyer Logistics."

¶ 35 On September 29, 2004, an attorney for the Bank sent a copy of a third forbearance agreement to an attorney representing Meyer Transportation and Meyer Container. This forbearance agreement contained many of the same terms as the previous two forbearance agreements and extended the Bank's forbearance to December 31, 2004. The attorney's letter noted that there were "three outstanding obligations, primarily the business manager agreement. Some of the smaller notes have been paid off."

¶ 36 In a letter dated October 6, 2004, an attorney representing Meyer Transportation and Meyer Container wrote a letter to the Bank's attorney stating that Meyer Transportation and Meyer Container had reviewed the proposed third forbearance agreement and had decided not to pursue any further settlement negotiations. At this point, negotiations between the Bank, Meyer Transportation, Meyer Container, and the Meyer brothers ended, and they never reached a final standstill agreement. David Meyer testified that they decided to end negotiations with the Bank because the Bank was "going to try to force Meyer Logistics to sign off to the entire debt from Meyer Transportation/Meyer Container," but Gilbert Meyer would not agree to do that.

¶ 37 On October 12, 2004, an attorney representing Meyer Logistics, Meyer Transportation, and Meyer Container sent a letter to ICC requesting that it cease making the 3% factor payment to the Bank until the Bank's lawsuit was resolved.

¶ 38 In late 2004 or early 2005, the Bank repossessed all of Meyer Transportation's and Meyer Container's trucks, equipment, and assets; consequently, Meyer Logistics no longer had use of those trucks and equipment. Meyer Logistics then purchased replacement trucks and equipment with Gilbert Meyer's credit. Nonetheless, the Bank continued to collect 3% of Meyer Logistics' accounts receivable factored with ICC after the repossession. Gehlbach admitted during his testimony that Meyer Logistic did not owe the Bank any money. The Bank, however, collected $591,000 from Meyer Logistics' factored accounts receivable after it repossessed the trucks and equipment. On April 29, 2005, Meyer Logistics filed its complaint against the Bank to recover these funds.

¶ 39 Prior to the trial, the Bank filed an affirmative defense to Meyer Logistics' complaint, alleging that Meyer Logistics "is the successor corporation to, and/or alter ego of, and/or merely a continuation of Meyer Transportation, Inc." Therefore, according to the Bank, Meyer Logistics is liable to the Bank for the obligation of Meyer Transportation under the Business Manager Agreement. The Bank, therefore, claimed that Meyer Logistics owed the Bank $887,397.63, and requested a setoff from any amounts for which the Bank might be found liable.

¶ 40 At the conclusion of the bench trial, on March 24, 2010, the circuit court entered a judgment in favor of Meyer Logistics in the amount of $591,000. The circuit court found that the May 22, 2003, agreement was intended to be a temporary agreement that was to be superseded later. The court further found that the 3% factor payment in the May 22, 2003, agreement was given by Meyer Logistics "in consideration of [the Bank] not repossessing trucks owned by Meyer Transportation, Inc. that [Meyer Logistics] was leasing."

¶ 41 The court further held that the subsequent forbearance agreement entered into by the Bank, Meyer Transportation, and Meyer Container superseded the May 22, 2003, agreement and terminated on July 31, 2004. In addition, the court held that even if the forbearance agreement did not supersede the May 22, 2003, agreement, that agreement was no longer enforceable after the Bank repossessed Meyer Transportation's trucks.

¶ 42 With respect to the Bank's affirmative defense that Meyer Logistics was an "alter ego" of Meyer Transportation, the court noted that Meyer Logistics was owned by Gilbert Meyer who never was a stockholder or officer of Meyer Transportation or Meyer Container. In addition, Gilbert Meyer financed the operation of Meyer Logistics, and the Bank knew that Gilbert Meyer was its sole shareholder. The court held as follows:

> "The evidence in this case does not justify piercing the corporate veil and finding that Meyer Transportation, Inc. or Meyer Container and Trailer Services, Inc. so controlled the affairs of Meyer Logistics that Meyer Logistics, Inc. is a mere instrumentality or dummy of Meyer Transportation, Inc. or Meyer Container and Trailer Services, Inc. and this finding does not sanction fraud or promote injustice."

¶ 43 The Bank timely appealed the circuit court's judgment.

¶ 44 ANALYSIS

¶ 45 (I)

¶ 46 Contract Construction

¶ 47 The Bank first argues that the circuit court erred in finding "[t]hat it was the intent of the parties that the 3% factor payment in the May 22, 2003 [agreement] was given by [Meyer Logistics] in consideration of [the Bank] not repossessing trucks owned by Meyer Transportation, Inc. that [Meyer Logistics] was leasing." The Bank argues that, under the terms of the parties' agreements, its right to take 3% of Meyer Logistics' factored accounts receivable was not conditioned upon the Bank's forbearance from repossessing the trucks. We disagree.

¶ 48 The issue before us is one of contract construction. In construing a contract, the court's primary focus is to ascertain and give effect to the intent of the parties. *Pielet v.*

Pielet, 407 Ill. App. 3d 474, 507, 942 N.E.2d 606, 635 (2010), *appeal allowed*, ___ Ill. 2d ___, 949 N.E.2d 1103 (2011). If no ambiguity exists in a contract, its construction is a question of law. *Farm Credit Bank of St. Louis v. Whitlock*, 144 Ill. 2d 440, 447, 581 N.E.2d 664, 667 (1991). However, "[w]here a court determines that a contract is ambiguous, its construction is then a question of fact, and parol evidence is admissible to explain and ascertain what the parties intended." *Farm Credit Bank of St. Louis*, 144 Ill. 2d at 447, 581 N.E.2d at 667. An ambiguous contract has language that is susceptible to more than one meaning or is obscure in meaning through indefiniteness of expression. *Wald v. Chicago Shippers Ass'n*, 175 Ill. App. 3d 607, 617, 529 N.E.2d 1138, 1145 (1988). "When a term is susceptible to two different interpretations, the court must follow the interpretation that establishes a rational and probable agreement." *In re Marriage of Hahn*, 324 Ill. App. 3d 44, 47, 754 N.E.2d 461, 463 (2001). The determination of whether a contract is ambiguous is a question of law. *City of Northlake v. Illinois Fraternal Order of Police Labor Council*, 333 Ill. App. 3d 329, 338, 775 N.E.2d 1013, 1021 (2002).

¶ 49 In the present case, the circuit court went outside the four corners of the agreements at issue to determine that the 3% factor payment in the May 22, 2003, agreement and in the subsequent agreements was given by Meyer Logistics in consideration for the Bank not repossessing Meyer Transportation's trucks. We agree with the circuit court that the agreements at issue are ambiguous; therefore, the circuit court properly considered parol evidence to determine the intent of the parties with respect to the 3% factor payment to the Bank. The May 22, 2003, agreement is the initial agreement that set out the 3% factor payment to the Bank, but the agreement does not expressly state what bargained-for consideration Meyer Logistics received in return for the 3% factor payment. We hold, therefore, as a matter of law, that parol evidence was necessary to determine the intent of the parties with respect to this payment. Although not controlling, we also note that both parties presented, without objection, parol evidence relevant to their intent.

¶ 50 Because the circuit court was required to consider parol evidence to determine the intent of the parties, its determination of the parties' intent with respect to the 3% factor payment should not be overturned unless it is against the manifest weight of the evidence. *Bunge Corp. v. Northern Trust Co.*, 252 Ill. App. 3d 485, 493, 623 N.E.2d 785, 791 (1993) ("Factual determinations regarding the meaning of contract language should not be overturned unless they are contrary to the manifest weight of the evidence."). "A judgment is against the manifest weight of the evidence only when an opposite conclusion is apparent or when findings appear to be unreasonable, arbitrary, or not based on evidence." *Judgment Services Corp. v. Sullivan*, 321 Ill. App. 3d 151, 154, 746 N.E.2d 827, 830-31 (2001).

¶ 51 In determining the intent of the parties to an ambiguous contract, the circuit court is to consider all the circumstances surrounding the contract that are relevant to the parties' intent. *Jacobs v. Carroll*, 46 Ill. App. 3d 74, 80, 360 N.E.2d 136, 140 (1977). In the present case, the circuit court properly considered all of the relevant circumstances surrounding and leading up to the agreements at issue and determined that Meyer Logistics' 3% factor payment was given as consideration for the Bank's agreement not to repossess Meyer Transportation's vehicles and equipment. We cannot say that the circuit court's determination was unreasonable, arbitrary, or not based on the evidence.

¶ 52 The evidence established that Meyer Transportation and Meyer Container were indebted to the Bank pursuant to various installment loans and pursuant to the terms of the Business Manager Agreement. Not only was Meyer Logistics not a party to any of these loans or the Business Manager Agreement, it did not even exist at the time those contracts were formed. In addition, Meyer Logistics' owner, Gilbert Meyer, was not a party to any of these agreements and was not a shareholder or officer of Meyer Transportation or Meyer Container.

¶ 53 When Meyer Transportation defaulted on its obligations with the Bank, Meyer Transportation, Meyer Container, the Bank, and the Meyer brothers began to negotiate a restructuring of the debts. Meanwhile, Gilbert Meyer formed Meyer Logistics. The record establishes that Meyer Transportation and Meyer Container leased their trucks and equipment to Meyer Logistics and that the Bank agreed, on a temporary basis, not to foreclose its liens on Meyer Transportation's and Meyer Container's trucks and equipment. The testimony of Gehlbach established that the Bank was aware that Meyer Logistics was a corporation solely owned by Gilbert Meyer and that it leased the trucks and equipment of Meyer Transportation and Meyer Container. Because Meyer Logistics was a start-up company, it needed immediate cash to fund the beginning of its operations. Therefore, it entered into an agreement with ICC to factor its accounts receivable.

¶ 54 On May 22, 2003, all of the interested parties entered into an interim agreement that benefitted all of the parties at that time. Meyer Logistics agreed to assign to Meyer Transportation and Meyer Container 3% of all money ICC advanced it under its factor agreement with ICC. Meyer Transportation and Meyer Container agreed, in turn, to assign this 3% factor payment to the Bank for payment on the outstanding debts. Under the terms of the agreement, Meyer Logistics was able to earn revenue from the use of the trucks and equipment, Meyer Transportation and Meyer Container earned revenue by leasing their trucks and equipment to Meyer Logistics, the Bank earned revenue from the 3% factor payments it withdrew from Meyer Transportation's account, and ICC earned revenue from factoring Meyer Logistics' invoices. Although not expressly stated in the four corners of the May 22, 2003, contract, this agreement benefitted everyone only if the Bank did not exercise its right to repossess the trucks and equipment. Accordingly, the circumstances surrounding the transaction support the circuit court's finding that the Bank's forbearance was an essential part of the agreement and the parties' intent with respect to the 3% factor payment.

¶ 55 Under the terms of the agreement, Meyer Logistics' 3% factor payment was assigned to Meyer Transportation and Meyer Container. The evidence at the trial established that ICC placed the 3% factor payment in an account held in the name of Meyer Transportation, and the Bank then withdrew the funds from Meyer Transportation's account. The Bank, therefore, did not receive the payment directly from Meyer Logistics, but from Meyer Transportation.

¶ 56 When Meyer Logistics entered into the May 22, 2003, agreement, it was not indebted to the Bank. All of the defaulted debts were between the Bank, Meyer Transportation, Meyer Container, and the Meyer brothers as guarantors. During his testimony, Gehlbach acknowledged that Meyer Logistics was not indebted to the Bank and explained that the May 22, 2003, agreement allowed Meyer Logistics to use "the equipment of Transportation and Container." Although the May 22, 2003, agreement did not expressly state that Meyer Logistics got to use the trucks and equipment as a result of the agreement, Gehlbach testified, "That was exactly what was going on."

¶ 57 At the trial, David Meyer also testified that the purpose of the May 22, 2003, agreement was "to allow [Meyer Logistics] to use the equipment that was previously owned by Meyer Transportation and Meyer Container." He testified, "Meyer Transportation and Meyer Container was going to lease the equipment, and the [3% factor payment] that we received from them [was] going to pay the debt to Bank of Edwardsville to pay down that debt." David Meyer's testimony concerning the purpose of the 3% factor payment is consistent with the language and structure of the May 22, 2003, agreement.

¶ 58 The circuit court's finding that Meyer Logistics leased the trucks and equipment from Meyer Transportation in consideration for the 3% factor payment is further supported by the July 2, 2003, intercreditor agreement between the Bank and ICC. The recitations in the intercreditor agreement state, "[Meyer] Logistics has leased some Bank Collateral from

[Meyer Transportation and Meyer Container] to operate its business operations and provide revenue to [Meyer] Logistics ***." The intercreditor agreement then set out the terms of the 3% assignment of Meyer Logistics' factored receivables to Meyer Transportation and Meyer Container and, in turn, from Meyer Transportation and Meyer Container to the Bank. The language of this intercreditor agreement supports the conclusion that the 3% factor payment and the use of the trucks and equipment are both part of the bargained-for consideration intended by the parties to the May 22, 2003, agreement and subsequent agreements.

¶ 59 In its interim forbearance agreements with Meyer Transportation and Meyer Container dated October 23, 2003, and April 14, 2004, the Bank again acknowledged that Meyer Transportation had "leased the company equipment" to Meyer Logistics. We also note that the Bank alleged that there was a lease arrangement between Meyer Logistics and Meyer Transportation in paragraph 14 of count VII of its replevin action to obtain possession of the trucks and equipment from Meyer Logistics.

¶ 60 This parol evidence supports the circuit court's finding with regard to the parties' intent with respect to the 3% factor payment. Since the use of the trucks and equipment was an essential part of the bargain, the trial court's finding that the Bank had no right to continue to collect the 3% factor payment after it repossessed the trucks and equipment was not against the manifest weight of the evidence.

¶ 61 The circuit court's finding is further supported by additional parol evidence concerning the negotiations that took place between all of the parties. During the debt restructuring negotiations, the Bank requested Meyer Logistics to sign as a guarantor for Meyer Transportation's and Meyer Container's outstanding debts. Gilbert Meyer, however, refused, and Gehlbach acknowledged that Meyer Logistics never had any outstanding debt with the Bank. Nonetheless, after the Bank foreclosed on the trucks and equipment, the Bank continued to take the 3% factor payment of Meyer Logistics' accounts receivable factored with ICC. Because Gilbert Meyer rejected the Bank's request that Meyer Logistics guarantee the outstanding debts, the most rational and probable interpretation of the May 22, 2003, agreement and subsequent agreements is that Meyer Logistics agreed to make the 3% factor payment only in exchange for use of the trucks and equipment; it did not agree to make the 3% factor payment indefinitely or until Meyer Transportation's outstanding debts were paid in full.

¶ 62 Once the Bank foreclosed on its liens and repossessed the trucks and equipment, Meyer Logistics no longer received any benefit of the bargain. Meyer Logistics had no further connection with the Bank, and the Bank no longer furnished any consideration which would entitle it to any payment whatsoever from Meyer Logistics.

¶ 63 The Bank argues that its agreement to allow ICC to have a primary security interest in Meyer Logistics' factored accounts receivables provided consideration for the 3% factor payment. This asserted consideration, however, is illusory because the Bank did not have a basis to assert any security interest in Meyer Logistics' accounts receivables. It had a security interest in Meyer Transportation's accounts receivable, not Meyer Logistics'. The Bank knew that Meyer Logistics was a new corporation that was solely owned by Gilbert Meyer, who had no association with Meyer Transportation. A promise not to enforce a nonexistent lien is an illusory promise. *Russo v. New York City Department of Correction*, 9 A.D.3d 528, 530, 780 N.Y.S.2d 195, 198 (2004) ("[T]he consideration of a reduction of a nonexistent lien was illusory."). An illusory promise is not sufficient consideration to support a contract. *Keefe v. Allied Home Mortgage Corp.*, 393 Ill. App. 3d 226, 230, 912 N.E.2d 310, 314 (2009).

¶ 64 The Bank also argues that the June 27, 2003, email from Meyer Logistics' attorney to Gehlbach constituted a new agreement that authorized the Bank to receive the 3% factor payment regardless of whether it repossessed the trucks and equipment. We disagree. The

June 27, 2003, email from Meyer Logistics' attorney authorized ICC to withhold and pay to the Bank 3% of the total dollar amount of invoices ICC purchased from Meyer Logistics. This email did not change the intent of the parties with respect to the purpose of the 3% factor payment. Instead, it merely clarified the parties' understanding that the Bank was entitled to the 3% factor payment from additional factored accounts receivable without additional addendums to the May 22, 2003, agreement. The email did not grant the Bank an unlimited right to collect the 3% factor payment and did not eliminate the parties' intent that the Bank would not repossess the trucks and equipment in return for the 3% factor payment from ICC.

¶ 65 (II)

¶ 66 Voluntary Payment Doctrine

¶ 67 As an alternative to its contract theory, the Bank argues that Meyer Logistics should be barred from recovering against the Bank pursuant to the voluntary payment doctrine. Under the voluntary payment doctrine, money voluntarily paid under a claim of right to the payment and with full knowledge of the facts cannot be recovered, unless the claim was unlawful and the payment was compulsory. *CIMCO Communications, Inc. v. National Fire Insurance Co. of Hartford*, 407 Ill. App. 3d 32, 37-38, 943 N.E.2d 276, 281 (2011). The voluntary payment doctrine is in the nature of an affirmative defense. "[A]n affirmative defense is a defense which gives color to an opponent's claim but then asserts new matter which apparently defeats the claim." *Campbell v. White*, 187 Ill. App. 3d 492, 505, 543 N.E.2d 607, 615 (1989).

¶ 68 The Bank raised the issue of the voluntary payment doctrine in a motion for summary judgment and in its closing arguments, but it did not raise the issue by way of an affirmative defense in its answer to the complaint. As a general rule, an affirmative defense must be set out in a defendant's answer to avoid surprise to an opposing party. *Cordek Sales, Inc. v.*

Construction Systems, Inc., 382 Ill. App. 3d 334, 376, 887 N.E.2d 474, 515 (2008). However, if an affirmative defense is raised in a motion for a summary judgment without objection, the defense is not waived despite the fact that it was not raised in the answer to the complaint. *Id*. In the present case, the circuit court did not address the issue of the voluntary payment doctrine in its judgment, but we will address the issue on appeal since it was raised in the Bank's motion for a summary judgment and in its closing arguments. After considering the merits of this argument, however, we hold that the Bank's argument under the voluntary payment doctrine is meritless.

¶ 69 In its brief, the Bank acknowledges that Meyer Logistics' attorney, on October 12, 2004, demanded that ICC discontinue making disbursement on the 3% factor payment. The Bank argues, however, that Meyer Logistics "took no action to enjoin ICC from making such payments" and that Meyer Logistics continued to factor its accounts receivable "knowing that it [(ICC)] would continue to make the 3% payment to the Bank." This evidence, however, does not establish that Meyer Logistics made voluntary payments to the Bank. Instead, the evidence establishes that ICC continued to transfer the 3% factor payment over Meyer Logistics' objection.

¶ 70 David Meyer testified at the trial that Meyer Logistics could not enter into a different factoring agreement with a different factor other than ICC. In its brief, the Bank challenges this testimony by noting that David Meyer also testified that Gilbert Meyer's credit was "absolutely tremendous." This testimony is not impressive because a corporation is a legal entity separate and distinct from its shareholders, officers, and directors. *Thompson v. Illinois State Board of Elections*, 408 Ill. App. 3d 410, 415, 945 N.E.2d 625, 630 (2011). Furthermore, the phrase "absolutely tremendous" is a vague assertion and falls far short of establishing that Meyer Logistics could have factored its accounts receivable with a different factor after the Bank repossessed the trucks and equipment. The Bank's argument pursuant to the voluntary payment doctrine is entirely unconvincing.

¶ 71 (III)

¶ 72 Piercing the Corporate Veil

¶ 73 The Bank's final argument is that Meyer Logistics is the "alter ego" of Meyer Transportation and Meyer Container and is, therefore, liable to the Bank for Meyer Transportation's and Meyer Container's outstanding debts.

¶ 74 One corporation may be treated as the alter ego of another if there is such a unity of interest and ownership that the individuality of one corporation has ceased and if the observance of the fiction of separate existence would under the circumstances sanction a fraud by promoting injustice. *Ampex Corp. v. Office Electronics, Inc.*, 24 Ill. App. 3d 21, 24, 320 N.E.2d 486, 488 (1974). If one corporation is merely a dummy or sham for another corporation, the distinct corporate entities will be disregarded and the two corporations will be treated as one. *Gass v. Anna Hospital Corp.*, 392 Ill. App. 3d 179, 185, 911 N.E.2d 1084, 1091 (2009). "One who seeks to have the courts apply an exception to the rule of separate corporate existence, however, must seek that relief in his pleading and carry the burden of proving actual identity or a misuse of corporate form which, unless disregarded, will result in a fraud on him." *South Side Bank v. T.S.B. Corp.*, 94 Ill. App. 3d 1006, 1010, 419 N.E.2d 477, 480 (1981). Piercing a corporate veil is a task which a court undertakes reluctantly since there is a presumption of corporate regularity. *Walker v. Dominick's Finer Foods, Inc.*, 92 Ill. App. 3d 645, 649, 415 N.E.2d 1213, 1217 (1980). The circuit court's finding on the issue of piercing the corporate veil will be reversed on appeal only where it is against the manifest weight of the evidence. *Rosier v. Cascade Mountain, Inc.*, 367 Ill. App. 3d 559, 566, 855 N.E.2d 243, 251 (2006).

¶ 75 "A party seeking to pierce the corporate veil must make a substantial showing that (1) there is such a unity of interest and ownership that the separate personalities of the corporations no longer exist and (2) circumstances exist so that adherence to the fiction of a separate corporate existence would sanction a fraud, promote injustice, or promote inequitable consequences." *Gass*, 392 Ill. App. 3d at 186, 911 N.E.2d at 1091.

¶ 76 "In determining whether the 'unity of interest and ownership' prong of the piercing-the-corporate-veil test is met, a court generally will not rest its decision on a single factor, but will examine many factors, including: (1) inadequate capitalization; (2) failure to issue stock; (3) failure to observe corporate formalities; (4) nonpayment of dividends; (5) insolvency of the debtor corporation; (6) nonfunctioning of the other officers or directors; (7) absence of corporate records; (8) commingling of funds; (9) diversion of assets from the corporation by or to a stockholder or other person or entity to the detriment of creditors; (10) failure to maintain arm's-length relationships among related entities; and (11) whether, in fact, the corporation is a mere facade for the operation of the dominant stockholders." *Fontana v. TLD Builders, Inc.*, 362 Ill. App. 3d 491, 503, 840 N.E.2d 767, 778 (2005). The second prong of the test requires an inquiry into whether there is an element of unfairness, something akin to fraud or deception, or the existence of a compelling public interest. *Id*. at 507, 840 N.E.2d at 781-82.

¶ 77 In *Sumner Realty Co. v. Wilcott*, 148 Ill. App. 3d 497, 501, 499 N.E.2d 554, 557 (1986), two corporations had the same shareholders and shared some, but not all, officers. In addition, one corporation rented office space from the other and stored some of its equipment in the same warehouse as the other. The court held that these facts alone were "insufficient to justify piercing the corporate veil." *Id*. In *Logal v. Inland Steel Industries, Inc.*, 209 Ill. App. 3d 304, 310, 568 N.E.2d 152, 156 (1991), the court declined to pierce the corporate veil where two corporations had the same board of directors and many of the same officers. The court noted that "the separate corporate existence of two corporations may not be disregarded merely because one of the corporations owns the stock of the other, the two share officers, or occupy the same office space." *Id*.

¶ 78 Likewise, in the present case, Meyer Logistics is an entity that is separate and distinct from Meyer Transportation and Meyer Container. Gilbert Meyer is the sole shareholder of Meyer Logistics, and he was not a shareholder or an officer of Meyer Transportation or Meyer Container. None of the Meyer brothers were officers or shareholders of Meyer Logistics. There was no evidence that the corporations commingled any of their funds or that one of the corporations controlled the others. The evidence established that David Meyer and Doug Meyer worked for Meyer Logistics and that Meyer Logistics leased trucks and equipment from Meyer Transportation and Meyer Container for a period of time. However, this evidence does not allow the court to disregard the separate corporate existence of Meyer Logistics. The evidence presented at the trial fell far short of establishing a unity of interest and ownership between the corporations. There was no evidence presented that would support a finding that Meyer Logistics was a dummy or sham corporation for Meyer Transportation and Meyer Container.

¶ 79 Furthermore, under the second prong of the test, the Bank did not establish that Meyer Logistics' separate corporate existence would sanction a fraud, promote injustice, or promote inequitable consequences. On the contrary, the evidence established that during the negotiations between the parties, the Bank was always aware that Meyer Logistics was a corporation solely owned by Gilbert Meyer and not owned by the Meyer brothers. The Bank's recognition of Meyer Logistics as a separate corporate entity is confirmed by the Bank's attempt to get Meyer Logistics to sign as a guarantor of Meyer Transportation's and Meyer Container's outstanding debts. Gehlbach admitted during his testimony that Meyer Logistics never became indebted to the Bank.

¶ 80 The trial court specifically found that the evidence did not justify piercing the corporate veil and found that neither Meyer Transportation nor Meyer Container controlled the affairs of Meyer Logistics. The court found that Meyer Logistics was not a dummy corporation of Meyer Transportation or Meyer Container. These findings were not against the manifest weight of the evidence.

¶ 81 CONCLUSION

¶ 82 For the foregoing reasons, the circuit court's judgment is affirmed.

¶ 83 Affirmed.